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The Audacity of Protecting Racist Speech under the National Labor Relations Act

Michael Z. Green[†]

ABSTRACT

Imagine two employees in the private sector workplace are discussing the possibility of selecting a union to represent their interests regarding wages and working conditions. During this conversation, a black employee notes the importance of using their collective voices to improve working conditions and compares the activity of selecting a union with the Black Lives Matter protests aimed at addressing the killings of black men in a number of high-profile incidents within the last couple of years. The other employee, a white male, responds by telling the black employee that “nothing will be gained from mentioning Black Lives Matter in this union organizing campaign. Black Lives Matter just represents a crusade to address what happened to a bunch of N-word criminals who got what they deserved. All lives matter.” The white male employee also stated “they need to stop being distracted by issues of race and focus on the only division that matters in the workplace: class.”

One might be surprised to learn that the white male’s statement could arguably be protected under the National Labor Relations Act (NLRA). The National Labor Relations Board (NLRB), the agency charged with enforcing the NLRA, has recently held that employees engaged in concerted activity on a picket line may utter racial epithets at black workers with impunity. Additionally, the NLRB has a long history of allowing employees engaged in concerted activity to respond to their supervisors with vile and disgusting language that arguably includes the use of racial epithets. Further, the NLRB places the burden on the employer to show that utterances of racial epithets in the workplace would clearly result in the same disciplinary action taken absent any concerted activity associated with the communications. The question of whether offensive and racist statements should be protected under the NLRA, when uttered by employees arguably engaged in concerted activity, raises a problem that has not yet been adequately addressed by the NLRB.

This Article asserts that in its decisions protecting employee use of racist speech while engaged in concerted activity, the NLRB has failed to consider the important

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operational and legal concerns that employers face in attempting to prevent harassment in the workplace based on race, a requirement under Title VII of the Civil Rights Act of 1964. Incidents of racism being highlighted nationally by the Black Lives Matter movement make this an important time for the NLRB, a federal agency concerned about workplace rights, to not send such a strong message that employees may utter racial epithets without any consequences. Further, these NLRB decisions send a broader, wrongful and even retaliatory message to black employees concerned about the use of racial epithets in the workplace: that nothing will happen if black employees protest this disruptive and offensive activity. This Article will review the important NLRB decisions regarding what is referred to as the audacity of protecting racist workplace speech under the NLRA. The Article will suggest an analytical change to how the NLRB should balance protection of concerted activity under the NLRA with the disruptive workplace activity of uttering racial epithets. The proposed change suggests an analytical framework that does not deter black employee protest of this disruptive behavior and accommodates Title VII's broad retaliation analysis.

I. INTRODUCTION: LEGAL PROTECTIONS FOR RACIST SPEECH UNDER THE NATIONAL LABOR RELATIONS ACT IN A BLACK LIVES MATTER CLIMATE

It should be no surprise that an employee's utterance of racist speech in the workplace, especially the use of the N-word,¹ could subject that employee to disciplinary action.² Harvard law professor, Randall Kennedy, has explained the significance of uttering this word:

Any person in the United States should be aware of the N-word. Ignorance could be very costly. Failing to recognize it as the signal of danger that it often is could well lead to injury, just as using it unaware of its effects and consequences could well cost a person his reputation, his job, or even his life.³

As a result, one might clearly expect that an employee who uses the N-word or any other form of racist speech in the workplace would be placing his job in jeopardy.

¹ Although some believe that it is important to use the actual word to represent its impact, I have specifically chosen to not use the actual word if not necessary and believe that any reader can easily determine the actual word through the use of the euphemism, N-word. As a result, the only point in this Article where you will see the actual word used is when it is being quoted directly from a source or in the title of a citation.

² See Leora F. Eisenstadt, *The N-Word at Work: Contextualizing Language in the Workplace*, 33 BERKELEY J. EMP. & LAB. L. 299, 306–10 (2012) (describing several incidents where celebrities and “average citizens” were all disciplined by their employers for uttering racist and offensive epithets due to public outrage and related concerns of the employer).

³ See Randall Kennedy, *The David C. Baum Lecture: “Nigger!” as a Problem in the Law*, 2001 U. ILL. L. REV. 935, 937 (2001).

Nevertheless, one might be surprised to find that some employees have resisted an employer's disciplinary action for uttering racist statements in the workplace⁴ by asserting that their derogatory statements constituted protected activity under the National Labor Relations Act (NLRA or the Act).⁵ Decisions by the National Labor Relations Board (NLRB or the Board), the federal agency which enforces the NLRA, have shielded employees from employer discipline despite the utterance of racial epithets.⁶

Concerns about race relations in our society have become more prominent through the development of the Black Lives Matter movement.⁷ By providing a unique social media vehicle for national protest

⁴ See *infra* Section II (discussing cases). This rights-based argument, while based on the NLRA and its statutory workplace rights, has broader implications when considering other legal arguments supporting rights-based protections to utter racist speech in the workplace, including claims under the First Amendment and contractual agreements to protect speech as part of academic freedom. Although beyond the scope of this Article, which is limited to the NLRA, and while also recognizing there are important policy reasons to protect even racist speech related to rights under these legal doctrines, these speech-based rights should be balanced with an employer's concern with providing efficiency and productivity because employees have to work together and should not be subjected to incivility and bullying that hamper efficiency in the workplace. See, e.g., *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 567–68 (1968) (referring to how the First Amendment protects public employee speech on matters of public concern but also allows for balancing the government's interest “as an employer, in promoting the efficiency of the public services it performs through its employees”); *Connick v. Myers*, 461 U.S. 138, 146–47 (1983) (discussing the public concern requirement and balancing it with the need for an employer to provide effective services). Even more importantly, and as highlighted herein, employers must be allowed to respond to racist utterances in the workplace to circumvent liability to black employees who are harmed by those statements as harassment; however, if these rights-based arguments are allowed to prevail, they can have the pernicious effect of creating a retaliatory environment for black employees who are deterred from protesting racist workplace speech. See *infra* Section III.

⁵ See Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§151–69 (2012)).

⁶ See, e.g., *Ozburn-Hessey Logistics, LLC*, 359 N.L.R.B. 1025, 1026 (May 2, 2013) (agreeing with the administrative law judge's decision that disciplinary action against a union supporter for the alleged use of the N-word in referring to an employee opposed to the union constituted use of the “anti-harassment policy to target union supporters” as pretext so that even if the employer “reasonably believed that [the employee] had used a racial epithet, [the Board] would find that the [employer] could not and did not establish that it would have disciplined her in the absence of union activity”), *vacated on other grounds*, *Ozburn-Hessey Logistics*, 200 L.R.R.M. (BNA) 1400 (N.L.R.B. 2014), 2014 WL 2929772 (N.L.R.B. June 27, 2014).

⁷ See Charles R. Lawrence III, *The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law*, 65 J. LEGAL EDUC. 381, 386 n.15 (2015) (“‘Black Lives Matter’ was first coined by two black women, Alicia Garza and Patrisse Cullors, in response to George Zimmerman's being found not guilty in the killing of Trayvon Martin.” (citing Nishat Kurwa, *‘Black Lives Matter’ Slogan Becomes a Bigger Movement*, NPR (Dec. 4, 2014), <http://www.npr.org/2014/12/04/368408247/black-lives-matter-slogan-becomes-a-bigger-movement> [<https://perma.cc/M8V6-YCF5>])); Nicole D. Porter, *Expanding Public Safety in the Era of Black Lives Matter*, 70 MIAMI L. REV. 533, 535 n.3 (2016) (“Black Lives Matter is a social justice movement and social media framework (#BlackLivesMatter), founded in the United States that started after the July 2013 acquittal of George Zimmerman in the shooting death of Florida teenager Trayvon Martin. The movement was further animated by the 2014 shooting of Michael Brown in Ferguson, Missouri. The social justice organizers who

through the discussion of several examples of how our society has reached a boiling point on matters of race, the Black Lives Matter movement has placed a public spotlight on racial insensitivity and also fostered a broad discussion with respect to when racist speech may be regulated versus when it may be protected in the employment setting.⁸ Before the Black Lives Matter movement started in response to recent killings of black men in Ferguson, Missouri; Charleston, South Carolina; New York, New York; and Baltimore, Maryland within the past few years,⁹ employees had made racist statements while also asserting their legally protected right to comment.¹⁰ However, several examples

conceived the term, Black Lives Matter, have asserted that it reinforces that African American lives, often viewed without value, are important.”). The Black Lives Matter movement website states that this movement was created “after Trayvon Martin’s murderer, George Zimmerman, was acquitted for his crime, and dead 17-year old Trayvon was posthumously placed on trial for his own murder.” About the Black Lives Matter Network, BLACK LIVES MATTER, <http://blacklivesmatter.com/about/> [https://perma.cc/6N7S-Z67A].

⁸ See Khanh Ho, *Microaggressions in the Workplace: Black Lives Matter and Politically Correct Speech*, HUFFPOST (October 8, 2016), http://www.huffingtonpost.com/khanh-ho/microaggressions-in-the-w_b_8265564.html [https://perma.cc/6369-MF2Y] (describing how most black persons feel uncomfortable protesting racism in the workplace until they have nothing left to lose as evidenced with the Black Lives Matter Movement and how debates have ensued about whether the response that All Lives Matter represents a racist statement because of the growing backlash to the Black Lives Matter movement); see also Jessica Guynn, *Zuckerberg Reprimands Facebook Staff Defacing ‘Black Lives Matter’*, USA TODAY (Feb. 25, 2016), <http://www.usatoday.com/story/tech/news/2016/02/25/facebook-mark-zuckerberg-black-lives-matter-diversity/80933694/> [https://perma.cc/MC5S-ATQN] (describing how Facebook CEO Mark Zuckerberg responded forcefully after employees crossed out Black Lives Matter and wrote All Lives Matter on the walls of the company’s campus by launching an investigation and stating that those communications represent a “deeply hurtful and tiresome experience for the black community” and the comments were “unacceptable” to him and how he was “very disappointed by this disrespectful behavior”).

⁹ See Lydia Polgreen, *From Ferguson to Charleston and Beyond, Anguish About Race Keeps Building*, N.Y. TIMES (June 20, 2015), <http://www.nytimes.com/2015/06/21/us/from-ferguson-to-charleston-and-beyond-anguish-about-race-keeps-building.html> [https://perma.cc/9ANG-JVNH] (cataloguing common concepts involved with several incidents where an unarmed black male was killed by police in the cities of Ferguson, Missouri; Baltimore, Maryland; Staten Island, New York; North Charleston, South Carolina; and Cleveland, Ohio, as well as the rough handling of black teenagers at a pool party by a police officer in McKinney, Texas, while also referring to a Black Lives Matter march in Charleston, South Carolina as a response to a white male entering a historically black church and killing nine black parishioners); see also Jelani Cobb, *The Matter of Black Lives*, NEW YORKER (Mar. 14, 2016), <http://www.newyorker.com/magazine/2016/03/14/where-is-black-lives-matter-headed> [https://perma.cc/82GM-8F8D] (referring to “flash points” in the Black Lives Matter movement as the trial of George Zimmerman for killing Trayvon Martin, the shooting of Michael Brown in Ferguson, Missouri, and the massacre of black parishioners at Emanuel African Methodist Episcopal Church in Charleston, South Carolina, all occurring during the second term of President Barack Obama).

¹⁰ See *Greer v. City of Warren*, 2012 WL 1014658, at *7 (W.D. Ark. Mar. 23, 2012) (finding that an employee’s display of a Confederate flag on MySpace, a social media website, and at home was protected First Amendment speech); *Dixon v. Coburg Dairy, Inc.*, 330 F.3d 250, 263–64 (2003) (finding that First Amendment protections were implicated where an employee refused to remove two Confederate flags from his tool box after a black co-worker complained, but that the employee’s insistence on keeping the tool box with the Confederate flags rather than getting a new tool box without the flags was not protected), *vacated on other grounds*, 369 F.3d 811 (4th Cir. 2005). Cf. *Pappas v. Giuliani*, 290 F.3d 143, 155–56 (2d Cir. 2003) (Sotomayor, J., dissenting) (finding that

have emerged where negative and even racist comments about the Black Lives Matter movement by employees have started to spark public debate about an employer's response to those statements when challenged.¹¹ Any efforts aimed at protecting racist speech in the workplace chills all forms of black worker protest whether made pursuant to the Black Lives Matter movement or for some other reason.

Furthermore, the Black Lives Matter movement has encouraged black workers to become more vocal in protesting racial conditions and employers have been faced with challenging questions about how to respond to these protests.¹² Probably the most recent and prominent debate regarding black employee protest about racist behavior stems from the acts of National Football League (NFL) player, Colin Kaepernick, who has responded to treatment of black individuals in our society by the police, the same concerns of the Black Lives Matter movement, through kneeling during the playing of the National Anthem during NFL games.¹³ Kaepernick has been "lauded . . . and equally vilified" by

racist speech by a white supremacist police officer was protected by the First Amendment as it involved "an employee speaking on issues of race relations entirely unrelated to his job"). However, the assertion of some legal right to utter a racially offensive statement does not guarantee that the employee will be protected from disciplinary action. *See, e.g., Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1187 (6th Cir. 1995) (holding that a basketball coach's use of the N-word when speaking to the team was not protected because it was not a matter of public concern as it did not relate to matters of "political, social, or other concern to the community"); *Pereira v. Comm'r of Soc. Services*, 733 N.E.2d 112, 119 (Mass. 2000) (finding that an employee dismissed for making a racist joke had not uttered speech on a matter of public concern).

¹¹ *See, e.g., Sam Wood, Jefferson Health Fires Employee over Racist Facebook Post*, PHIL. INQUIRER (July 15, 2016), http://www.philly.com/philly/health/20160715_A_racist_Facebook_post_leads_to_firing_of_Jefferson_employee.html [<https://perma.cc/W5LU-66ZZ>] (describing the termination of a hospital worker for posting racist comments on Facebook about Black Lives Matter protesters and describing terminations of other employees including police officers, fire fighters, and a corrections officer for making racist statements on Facebook about the Black Lives Matter movement); *see also* Dougal Ernst, *Black Lives Matter Critic Harassed for Saying 'All Lives Matter'*, WND (Nov. 20, 2015), <http://www.wnd.com/2015/11/black-lives-matter-critic-fired-for-saying-all-lives-matter/> [<https://perma.cc/7EZ3-4WBP>] (discussing a female's Facebook post arguing that "All Lives Matter" in response to Black Lives Matter movement and how those who felt the statement was racist responded to her and even suggested contacting her employer to protest her comments); Jarvis DeBerry, *Op-ed Critical of 'Black Lives Matter' Followed by Cowardly Apology in Student Paper: Jarvis DeBerry*, NOLA.COM (Sep. 26, 2015), http://www.nola.com/opinions/index.ssf/2015/09/wesleyan_black_lives.html [<https://perma.cc/XW8A-Q7YT>] (describing op-ed written in the Wesleyan university student newspaper by a white male staff writer criticizing the Black Lives Matter movement and subsequent student protests to the writer's employer charging the op-ed as being racist along with requests seeking to stop funding for the student newspaper and other pressures that led to the eventual and unusual response by the newspaper of issuing an apology).

¹² Jon Hyman, *Why #BlackLivesMatter Should Matter to Employers*, WORKFORCE (July 13, 2016), <http://www.workforce.com/2016/07/13/why-blacklivesmatter-should-matter-to-employers/> [<https://perma.cc/6CES-TVBR>] (describing how the Black Lives Matter movement is fostering more discussion of race and leading to more black worker protest to racist or discriminatory messages that employers should be prepared to respond to without retaliation under Title VII and without violating the concerted activity rights of black employees in protesting, a violation of the NLRA).

¹³ *See* Elliott Almond, *Shades of Ali: Kaepernick Sparked New Wave of Athlete Protest*,

the public and even a Supreme Court justice for his protest while also receiving an award voted on by his co-worker teammates for his courage.¹⁴ Kaepernick's situation, sparked by concerns raised by the Black Lives Matter movement, now highlights a new reality regarding how comfortable black employees feel about protesting matters of race in the workplace.

This new reality offers key challenges for employers as they decide the appropriate response to racism while seeking a productive workplace. As a result, employers need to know that they may take action against an employee's racially derogatory statements without the limitations created by the NLRB's decision to protect racist speech. In 2015, then-NLRB Member Harry I. Johnson discussed the growing concern about the challenges employers face when presented with harassment cases arising under the NLRA:

We live and work in a civilized society, or at least that is our claimed aspiration. The challenge in the modern workplace is to bring people of diverse beliefs, backgrounds, and cultures together to work alongside each other to accomplish shared, productive goals. Civility becomes the one common bond that can hold us together in these circumstances. Reflecting this underlying truth, moreover, legal and ethical obligations make employers responsible for maintaining safe work environments that are free of unlawful harassment. Given all this, employers are entitled to expect that employees will coexist treating each other with some minimum level of common decency.¹⁵

This Article asserts that employees who utter racist statements should be subject to regulation by their employers regardless of whether those statements have been uttered in a context where concerns about protection of rights under the NLRA may also be present.¹⁶ In this Black

MERCURY NEWS (Dec. 27, 2016), <http://www.mercurynews.com/2016/12/27/2016kap/> [<https://perma.cc/J4KQ-V8YU>] (describing Kaepernick's protest).

¹⁴ *Id.*; see Tim Kawakami, *Colin Kaepernick's Very Notable Honor, Jed York's Very Telling Comment and the 49ers' 2017 Housecleaning Set-Up*, TALKING POINTS (Dec. 31, 2016), <http://blogs.mercurynews.com/kawakami/2016/12/31/kaepernick-baalke/> [<https://perma.cc/BBP7-P2JT>] (describing how Kaepernick's General Manager was wrong about criticizing Kaepernick for creating a distraction with his protest and suggesting Kaepernick should not be employed as the quarterback and leader of his team when the players resoundingly rejected this narrative by voting to give Kaepernick the prestigious Eshmont award for his courage); see also Gene Collier, *The Colin Kaepernick Saga is Preposterous*, PITTSBURGH POST-GAZETTE, Aug. 13, 2017 (describing how Kaepernick won an award voted on by his co-workers for "inspirational and courageous play" but still cannot find a job as a quarterback because of his protest and not because of his abilities).

¹⁵ *Pier Sixty, LLC*, 362 N.L.R.B. No. 59, 2015 WL 1457688, at *5 (Mar. 31, 2015) (Member Johnson, dissenting), *enforced*, 855 F.3d 115 (2d Cir. 2017).

¹⁶ Only the scope of the disciplinary action taken may be limited to ensure that the employer's

Lives Matter climate where black employees have demanded more responsiveness to issues of race, employers must face the pressing desire for civility and the overall legal and moral need to prevent and respond to offensive statements that may create a hostile environment. As a result, employers have strong incentives to respond to racist statements uttered in the workplace.

Some NLRB decisions have balanced the concerted activity interest of employees with other employer interests in ensuring that other employees are free from harassment, incivility, bullying, and disparagement.¹⁷ The NLRB should clearly apply this analysis in all situations involving racist utterances. Because some words (such as the N-word) are inherently offensive regardless of the context in which the statement was made,¹⁸ it is essential that employers be able to address reasonable regulation of those racist utterances in a way that accommodates important efficiency values and concerns about preventing racial harassment, while superseding policy reasons or rights-based arguments to allow employees to speak freely.

In Section II, this Article examines the scope of legal protections regarding racist speech under the NLRA. Section II also examines the unique perspective of the use of the N-word and other racist utterances as a form of speech afforded some protection under the NLRA and the

actions have been consistently applied to statements of all workers and not just those who are also asserting rights protected by the NLRA.

¹⁷ See Arielle A. Dagen-Sunsdahl, Note, *Navigating Through Hills & Dales: Can Employers Abide by the NLRA While Maintaining Civil Work Environments?*, 31 ABA J. LAB. & EMP. L. 363, 378 (2016) (balancing employer civility policies with rights by the NLRA). Cf. William Beaumont Hospital, 363 N.L.R.B. No. 162 (Apr. 3, 2016) (Member Miscimarra, concurring in part and dissenting part) (arguing that an employer's "legitimate justification" and interests in regulating certain workplace activities through policies and rules should be balanced with any potentially adverse impact on employee rights protected by the NLRA). Due to the political nature of the NLRB and how it is generally accepted that the President may appoint three of its five members from the President's party, there is a legitimate concern that the Board's position on issues may change with a new Republican President after eight years with a Democratic President. See Michael Z. Green, *The NLRB as an Überagency for the Evolving Workplace*, 64 EMORY L.J. 1621, 1627 (2015) (describing partisan nature of the appointment of NLRB members). Given the number of dissenting opinions by Republican Board members, such as Harry Johnson and the current acting chairman, Phillip Miscimarra, criticizing the Board's failure to consider an employer's obligations to respond to harassing conduct under Title VII, the Board may soon consider changing its analytical approach with respect to the cases discussed herein after President Trump completes his NLRB appointments.

¹⁸ See Alexander Tsesis, *The Boundaries of Free Speech*, 8 HARV. LATINO L. REV. 141, 145 (2005) (reviewing the 2004 landmark publication by Richard Delgado & Jean Stefancic, *Understanding Words that Wound*, and suggesting that "[c]alling someone a 'spic,' a 'kike,' or 'nigger' floods the imagination . . . with insulting ideas about Latinos, Jews, and African Americans" and that these terms represent "[s]tereotypes that have been communicated repeatedly in diverse social contexts" where they "require less information to evoke a whole series of negative connotations"); see also Eisenstadt, *supra* note 2, at 314 (suggesting that some racist speech must be evaluated by its context including the "time, place, identity of the parties, and tone of voice").

rationales supporting that protection. Section III highlights the compelling policy interests that make it extremely important for employers to be able to regulate racist speech through appropriate regulatory responses that discipline employees. Section III also establishes a framework for employers to regulate workplace speech that accommodates both important policy reasons for allowing employees to speak freely and important reasons for employers to take disciplinary action when employees utter racist statements, including legal and productivity interests. That accommodating framework can balance these interests by adopting retaliation analysis developed under Title VII of the Civil Rights Act of 1964 (Title VII), which bans employment discrimination based upon race, color, sex, national origin and religion.¹⁹ In Section IV, the Article concludes that the consequences of racist speech, including offensiveness that can eventually lead to a hostile racial environment for black employees under Title VII, can be handled in a fair and balanced way through analytical changes under the NLRA and a focus on broader concerns about creating an environment condoning retaliation against black employees who want to challenge or protest racist speech.

II. BACKGROUND: NLRA RATIONALES FOR LEGAL PROTECTIONS OF RACIST WORKPLACE SPEECH

A. Picket Line Comments: *Clear Pines Mouldings* Protects Racial Epithets and Vulgarities If They Do Not Include Threats

Section 7 of the NLRA provides: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”²⁰ Also, Section 8(a)(1) of the NLRA creates an unfair labor practice that can be prosecuted by the NLRB if an employer acts “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].”²¹ Section 7

¹⁹ 42 U.S.C. § 2000e-2a (2012).

²⁰ 29 U.S.C. § 157 (2012).

²¹ 29 U.S.C. § 158(a)(1) (2012).

of the NLRA applies to “all forms of worker activism” whether in a unionized environment or in a workplace with no union,²² while also including picketing activity.²³

In its *Clear Pine Mouldings, Inc.*²⁴ decision, the NLRB found that certain misconduct by striking employees on the picket line warrants protection as concerted activity.²⁵ Unless their misconduct may reasonably tend to coerce or intimidate employees in the exercise of their Section 7 rights and the General Counsel proves that striking employees were denied reinstatement for this misconduct, striking employees should be reinstated to the positions they held prior to the strike.²⁶ The Board in *Clear Pine Mouldings* further clarified that: “we reject the per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts”²⁷ and “the only activity the statute privileges in this context, other than peaceful patrolling, is the nonthreatening expression of opinion, verbally or through signs and pamphleteering.”²⁸

Unfortunately, the NLRB has expanded upon *Clear Pine Mouldings* to find that the utterance of racial epithets by striking employees warrants protection.²⁹ First, in the 2004 decision in *Detroit Newspapers*,³⁰ the initial steps arose that led to the Board’s expanded application of *Clear Pine Mouldings* to cover racist comments when the administrative law judge found that racist statements by a striking employee did not constitute threats and, as a result, the comments were protected.³¹ The employee’s statements in *Detroit Newspapers* included saying “[y]ou fuckin’ bitch, nigger lovin’ whore” and “[i]t’s your fault that white America lost their jobs.”³²

²² See Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2024 (2009) (“Section 7 could be read as providing general anti-retaliation protection for all forms of worker activism, so long as the activism is ‘concerted’ and for ‘mutual aid or protection.’”). An employer may not retaliate against an employee for exercising the right to engage in protected concerted activity. *Triangle Elec. Co.*, 335 N.L.R.B. 1037, 1038 (2001); *Meyers Indus., Inc.*, 268 N.L.R.B. 493, 497 (1984).

²³ Gerold J. Kehoe, *Picket Line Misconduct: When Push Comes to Shove are Section 7 Rights Lost in the Shuffle?*, 58 TEMPLE L.Q. 921 (1985).

²⁴ 268 N.L.R.B. 1044 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985).

²⁵ 268 N.L.R.B. at 1062.

²⁶ *Id.* at 1046.

²⁷ *Id.*

²⁸ *Id.* at 1047.

²⁹ See, e.g., *Airo Die Casting, Inc.*, 347 N.L.R.B. 810, 811–12 (2006).

³⁰ 342 N.L.R.B. 223 (2004).

³¹ *Id.* at 268–69.

³² *Id.* at 268.

In relying on prior striker misconduct decisions not involving racist comments but involving profanity and “vile language and/or gestures, standing alone” that did not constitute forfeiture of rights because there was no threat, the administrative law judge in *Detroit Newspapers* found: “While there is no doubt what [the employee] said . . . was clearly offensive and reprehensible under any objective standard, it does not constitute grounds for discharge under *Clear Pine Mouldings*.”³³ Although it appears that *Detroit Newspapers* was the first key case where the use of racial epithets, not just profanity, was at issue, the Board did not specifically address or adopt the administrative law judge’s analysis about the racial epithet being protected. The individual case, involving the charges related to the employee making those racist statements and the subsequent disciplinary action being challenged pertaining to that employee, settled after the administrative law judge’s decision and it was not one of the charges considered by the Board in its final decision in *Detroit Newspapers*.³⁴

Nevertheless, the Board specifically expanded the *Clear Pine Mouldings* analysis to include racial epithets and racist statements in its 2006 decision in *Airo Die Casting, Inc.*³⁵ In *Airo Die Casting*, the Board affirmed the administrative law judge’s finding that the employer committed an unfair labor practice after the judge determined that a picketer’s racial slur, “fuck you nigger,” standing alone, did not constitute a threat and was protected.³⁶ The *Airo Die Casting* administrative law judge cited the Board’s *Detroit Newspapers* decision for support despite the fact that the Board in *Detroit Newspapers* never adopted the rationale of the *Detroit Newspapers* administrative law judge decision regarding the application of racial epithets under *Clear Pine Mouldings*.³⁷ The administrative law judge in *Airo Die Casting* also cited *Nickell Moulding*³⁸ in support of the decision, which involved the use of profanity, absent any racial epithets, and was subsequently reversed.³⁹

Furthermore, two out of the three members involved in the Board decision in *Airo Die Casting* signaled a possible change to the Board’s analysis when considering an employee’s use of racial epithets, like the

³³ *Id.* at 269.

³⁴ *Id.* at 223–24 & n.4.

³⁵ 347 N.L.R.B. 810 (2006).

³⁶ *Id.* at 812.

³⁷ *Id.* (“[T]he Board has found that a striker’s use of the most vile and vulgar language, including racial epithets, does not deprive him of the protection of the Act, so long as those actions do not constitute a threat.”) (citing *Detroit Newspapers*, 242 N.L.R.B. 223 (2004)).

³⁸ 317 N.L.R.B. 826 (1995), *rev’d*, *NMC Finishing v. NLRB*, 101 F.3d 528, 530 (8th Cir. 1996).

³⁹ 101 F.3d at 530.

N-word, under the *Clear Pine Mouldings* standard. Specifically, Members Schaumber and Kirsanow noted in *Airo Die Casting* that although they agreed with the administrative law judge's findings in the case, they also believed that "there may well be circumstances, absent here, in which a picketing employee's use of the word 'nigger' might cause the employee to lose the Act's protection, even in the absence of violence or explicit threats of violence."⁴⁰ In considering an employee's utterance of the N-word, Republican Board Members Schaumber and Kirsanow suggested that "under the right (or wrong) circumstances, the word itself may be so incendiary as to constitute an implied threat or an incitement to violence."⁴¹

For several years, *Airo Die Casting* appeared to be the only Board decision that seemed to support the protection of racist statements on the picket line as an extension of *Clear Pine Mouldings*, despite its divided reasoning about racist utterances and its reliance on an administrative law decision in *Detroit Newspapers* as concrete precedent when the Board never addressed the issue due to a settlement. In its most recent decision on the subject in 2016, the NLRB has continued to expand its application of *Clear Pine Mouldings* to protect striker misconduct involving racist speech while ignoring broader concerns about an employer's need to address racial harassment of its black workers.

In *Cooper Tire & Rubber Co.*,⁴² an NLRB administrative law judge found that an employee's alleged racist comments while on the picket line during a lockout constituted protected activity under the NLRA.⁴³ The employee, Runion, while acting as a member of a picket line, yelled out toward black replacement workers who crossed the picket line to enter the workplace: "Hey, did you bring enough KFC for everyone?" and "Hey, anybody smell that? I smell fried chicken and watermelon."⁴⁴ These comments were captured on videotape by one of the employer's security guards.⁴⁵ Although the employee admitted that he made the KFC statement, he did not agree that he made the chicken and watermelon statement.⁴⁶

The employer terminated Runion for making these statements while on the picket line. After the termination, a grievance was filed by Runion's union and the dispute went to an arbitrator. The arbitrator

⁴⁰ 347 N.L.R.B. 810, 810 n.1 (2006).

⁴¹ *Id.*

⁴² 363 N.L.R.B. No. 194, 2016 WL 2894792 (May 17, 2016), *enforced*, 866 F.3d 885 (8th Cir. 2017).

⁴³ *Id.* at *2.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

decided that the employee had uttered both statements and upheld the termination as made by the employer with just cause due to the employee's serious misconduct in saying the statements and conveying the statements in the picket line context, which could have incited violence.⁴⁷ The union asked the Board not to defer to the arbitration decision and to consider the union's charge of an unfair labor practice.⁴⁸ The NLRB filed an unfair labor practice complaint and alleged that while the racist comments could be considered offensive, they were insufficient to warrant termination of the employee.⁴⁹

Specifically, the NLRB's General Counsel asserted that pursuant to established Board precedent in *Airo Die Casting*⁵⁰ and *Detroit Newspapers*,⁵¹ the "racially charged statements did not tend to coerce or intimidate employees in their Section 7 rights because they were not accompanied by threats or aggressive behavior."⁵² The situation and the comments in *Airo Die Casting* were similar to the facts in *Cooper Tire*; however, the *Airo Die Casting* comments included even stronger racial language as an employee on the picket line approached both cars crossing the picket line and an African American security guard and yelled with both his middle fingers extended: "[F]uck you nigger."⁵³ In *Airo Die Casting*, the Board found that the employee's activity was protected as long as it was not a threat.⁵⁴ The comments in *Detroit Newspapers* included "racial epithets such as 'you fuckin' bitch, nigger lovin' whore,'" which were deemed protected statements under the NLRA by the administrative law judge as long as they did not constitute threats, although the unfair labor practice charges regarding this matter were settled and not considered by the Board in its final decision.⁵⁵

The Board in *Cooper Tire* affirmed the administrative law judge's decision while also refusing to consider the administrative law judge's discussion of *Detroit Newspapers* as persuasive because the Board never considered the racist language in *Detroit Newspapers*.⁵⁶ In the *Cooper*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 347 N.L.R.B. 810 (2006).

⁵¹ 342 N.L.R.B. 223 (2004).

⁵² *Cooper Tire*, 363 N.L.R.B. No. 194, 2016 WL 2894792, at *2 (administrative law judge decision describing the contentions of the parties).

⁵³ *Airo Die Casting*, 347 N.L.R.B. at 811.

⁵⁴ *Id.* at 810 n.3 (affirming administrative law judge decision finding at 347 N.L.R.B. at 811–12).

⁵⁵ *Cooper Tire*, 363 N.L.R.B. No. 194, 2016 WL 2894792, at *2 n.11 (administrative law decision referring to *Detroit Newspapers*, 342 N.L.R.B. at 223–24).

⁵⁶ *Id.* at *1 n.1 ("Finally, in adopting the judge's findings, we do not rely on his citations to the administrative law judge's decisions in *Detroit Newspapers*, 342 N.L.R.B. 223, 268–69 (2004) and

Tire decision, the Board noted that it was appropriate not to defer to the arbitrator's decision. Specifically, the arbitrator's finding conflicted with the Board's standard in *Clear Pine Mouldings* by concluding the employee's conduct was even more serious because it occurred on a picket line.⁵⁷

What is somewhat interesting is that the Board in *Cooper Tire* distinguished the result from its 1955 decision, *Spielberg Manufacturing Co.*,⁵⁸ where four striking employees were found to have engaged in unprotected activity on the picket line and were lawfully refused reinstatement when "they persistently shouted profane insults, including racist slurs, at individuals over several days of picketing."⁵⁹ According to the Board in *Cooper Tire*, the conduct in *Spielberg* was "distinguishable from the instant case on its facts."⁶⁰ This finding suggests that the Board distinguished the two racial slurs made by Runion in *Cooper Tire* from the four striking employees in *Spielberg* because their racial slurs were made over a longer period of time and directly to individual employees. Also, the Board found it important that Runion's statements in *Cooper Tire* were only "made about replacement workers after a closed van carrying those workers had passed."⁶¹

Here is where the Board's slavish and narrow adherence to the *Clear Pine Mouldings* standard has gone awry given the realities of our heightened Black Lives Matter climate in the workplace. The Board tends to assume that the use of racist statements on the picket line, per se, does not coerce employees in the exercise of their Section 7 rights. However, as the arbitrator in *Cooper Tire* indicated, any African-American employee who was the object of the race-related comments made by Runion would consider the comments "disrespectful of [their] dignity."⁶² Also, by protecting the comments at issue and not deferring to

Wayne Stead Cadillac, 303 N.L.R.B. 432, 436 (1991), which the judge found 'persuasive' but had not been subject to Board review.").

⁵⁷ *Id.* ("We agree with the judge that deferral is inappropriate based on his conclusion that the arbitrator's decision was 'clearly repugnant' to the Act, including on the ground that the arbitrator's statement that employee Anthony Runion's conduct was 'even more serious' because it occurred on a picket line is contrary to the Board's standard for evaluating picket-line misconduct under *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), enforced, 765 F.2d 148 (9th Cir. 1985), cert. denied, 474 U.S. 1105 (1986). However, we do not rely on the parts of the judge's rationale that can be read to find that the arbitrator failed to adequately consider the unfair labor practice issue.").

⁵⁸ 112 N.L.R.B. 1080 (1955).

⁵⁹ *Cooper Tire*, 363 N.L.R.B. No. 194, 2016 WL 2894792, at *1 n.1 (citing *Spielberg*, 112 N.L.R.B. at 1082 & n.6).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at *2.

the decision of the arbitrator, the Board seemed to countenance an environment where even more racist statements would transpire and more potential for violence could occur.⁶³

What the Board fails to consider in its analysis is how such racist statements can coerce those African American employees exercising their Section 7 rights. Would not most African-American employees feel uncomfortable about striking workers who they may have to work side by side with when the strike is over if those striking workers were so readily willing to use racist statements and racial epithets while on the picket line? By the very nature of uttering the racist speech, are not the striking employees trying to coerce the black workers into not continuing to work with them? Otherwise, why use racist speech in the first instance? Even if the Board has the audacity to continue finding that racist statements made while on the picket line should be protected unless they rise to the level of a threat or coercion of Section 7 rights under *Clear Pine Mouldings*, the Board should, at a minimum, reconsider how racist statements can coerce employees in the use of their Section 7 rights and should not condone racist statements under any standard the Board uses.

Bloggers have commented about the Hobson's choice that employers may face based upon *Cooper Tire*.⁶⁴ As long as the racist statements are not threats and were part of activity pursued on behalf of Section 7 activity, the speech will be protected and employer disciplinary actions would violate the NLRA. However, failing to take disciplinary action could subject the employer to liability for racial discrimination claims. Given that the NLRB approved the administrative law judge's findings in *Cooper Tire* on May 17, 2016, it is unlikely that the current members from the 2016 Board will change their analysis, especially since it appears to be consistent with the Board's earlier decision in *Airo Die Casting*.⁶⁵ Russell L. Samson, a management attorney, has recommended that employers:

⁶³ *Id.* at *2 n.5 (describing how an unidentified person used the N-word on the picket line after Runion left).

⁶⁴ Thomas T. Hearn, *NLRB Rules that Racism Is a Protected Activity*, HR LEGALIST (June 24, 2015), <http://www.hrlegalist.com/2015/06/nlr-rules-that-racism-is-a-protected-activity/> [<https://perma.cc/524N-7Z7S>]; Jillian Kay Melchor, *The NLRB Sides with Despicably Racist Union Workers over Their Employer*, NATIONAL REVIEW (June 15, 2015), <http://www.nationalreview.com/article/419745/nlr-b-sides-despicably-racist-union-workers-over-their-employer-jillian-kay-melchior> [<https://perma.cc/RR9F-5ARQ>]; Russell L. Samson, *Title VII vs. NLRA on the Picket Line: Employers in a Quandary*, DICKINSON IOWA EMPLOYER LAW BLOG (June 25, 2015), <http://www.dickinsonlaw.com/2015/06/title-vii-vs-nlra-picket-line-employers-quandary/> [<https://perma.cc/MA5U-3UNX>]; Christian Schappel, *One Unbelievable NLRB Ruling: Racist Comments Protected*, HR MORNING (June 12, 2015), <http://www.hrmorning.com/unbelievable-nlr-b-ruling-racist-comments-protected/> [<https://perma.cc/P9AY-HZ6X>].

⁶⁵ The employer in *Cooper Tire* challenged the Board's decision to the United States Court of

should favor the broader societal policy expressed in the general discrimination laws as amplified by the courts: Adopt, adhere to, and enforce a “no harassment” policy to teach bigots that “expressing their opinions in a way that abuses or offends their co-worker will not be tolerated.” If there is going to be an imprimatur on such conduct, let it be done by some outside entity.⁶⁶

Some courts have started to reject the NLRB’s approach. In *NMC Finishing v. NLRB*⁶⁷ the United States Court of Appeals for the Eighth Circuit found that a female striker’s display of a picket sign, “Who is Rhonda F [with an X through the F] Sucking today?” was not protected activity and refused to enforce the Board’s decision that the activity was protected by the Act.⁶⁸ Additionally, in *Media General Operations, Inc., d/b/a The Tampa Tribune*,⁶⁹ the United States Court of Appeals for the Fourth Circuit reversed the Board and found that an employee lost the Act’s protection when he called the employer’s vice president a “stupid fucking moron” while criticizing the vice president’s mailings and bargaining tactics even though the employee later apologized.⁷⁰ These cases, while not even involving examples of hideous racist statements, do establish that some federal courts have reversed the NLRB’s expansive protection of offensive speech.

Finally and most recently, Judge Millett, of the United States Court of Appeals for the District of Columbia Circuit, wrote a concurring opinion in *Consolidated Communications Inc. v. NLRB*⁷¹ that called the Board to task for its stilted approach to addressing the use of vulgarity and racial epithets through the prism of the *Clear Pine*

Appeals for the Eighth Circuit; the decision in that Court was still pending at the time this Article was submitted. See Brief Amicus Curiae of Equal Employment Advisory Council, 2016 WL 5122576 (Sept. 6, 2016); Brief for Intervenor Union, 2016 WL 6694581 (Nov. 9, 2016); Brief for the NLRB, 2016 WL 6694582 (Nov. 10, 2016); Reply Brief for Petitioner/Cross Respondent, 2016 WL 7335072 (Dec. 9, 2016). While this Article was going through final edits, the Eighth Circuit issued a decision affirming the decision of the NLRB. See *Cooper Tire & Rubber Co. v. NLRB*, 866 F.3d 885 (2017). A dissenting opinion to the 2 to 1 decision criticized the Board and the court majority’s deference to prior Board decisions while noting that “[n]o employer in America is or can be required to employ a racial bigot.” *Id.* at 894 (J. Beam, dissenting). The final resolution of this matter is unclear as the Employer has petitioned for a rehearing en banc with the Eighth Circuit and further decisions may arise. Also, with a new Republican president, Donald Trump, the make-up of the NLRB is likely to change. The current sole Republican Member who was on the 2016 Obama Board and did not participate in the *Cooper Tire* decision, Philip Miscimarra, is now the acting chairman and will eventually become part of the NLRB’s majority called upon to assess further application of the *Clear Pine Mouldings* doctrine.

⁶⁶ Samson, *supra* note 64.

⁶⁷ 101 F.3d 528, 530 (8th Cir. 1996), *rev’g Nickell Moulding*, 317 N.L.R.B. 826 (1995).

⁶⁸ *Id.*

⁶⁹ 560 F.3d 181 (4th Cir. 2009), *denying enforcement*, 351 N.L.R.B. 1324 (2007).

⁷⁰ *Id.*

⁷¹ 837 F.3d 1 (D.C. Cir. 2016).

Mouldings standard.⁷² Specifically, Judge Millett first concluded in the majority opinion that the employee's behavior of grabbing his crotch and making an obscene gesture towards a female, non-striking employee was protected as part of "the rough-and-tumble nature of picket lines."⁷³ The court also noted that the Board had incorrectly limited its analysis to whether the misconduct was violent instead of asking whether the striking employee's misconduct may "reasonably tend to coerce or intimidate" employees under the *Clear Pine Mouldings* requirement.⁷⁴

In the concurring opinion, Judge Millett noted that her reasons for writing a separate opinion were to "convey [her] substantial concern with the too-often cavalier and enabling approach that the Board's decisions have taken toward the sexually and racially demeaning misconduct of some employees during strikes."⁷⁵ Judge Millett's evident frustration was based upon Board decisions she believed had "repeatedly given refuge to conduct that is not only intolerable by any standard of decency, but also illegal in every other corner of the workplace," including "sexually and racially disparaging conduct that Board decisions have winked away."⁷⁶ From her perspective, the Board's analysis has failed to address "the very types of demeaning and degrading messages that for too much of our history have trapped women and minorities in a second-class workplace status."⁷⁷ Although Judge Millett questions several cases involving sexist statements, the "racially derogatory and demeaning epithets and behavior" protected by the *Airo Die Casting* and *Cooper Tire* decisions also fall within the specific ire trumpeted by her concurring opinion.⁷⁸ Judge Millett captures the overall concern of this Article by asking "how on earth can calling an African-American worker 'nigger' be a tolerated mode of communicating worker grievances?"⁷⁹

⁷² *Id.* at 20–24 (Millett, J., concurring).

⁷³ *Id.* at 12 (majority opinion). Judge Millett authored both the majority opinion and the concurring opinion in this case. *See id.* at 5–20 (majority opinion) and 20–24 (concurring opinion).

⁷⁴ *Id.* at 18.

⁷⁵ *Id.* at 20 (Millett, J., concurring).

⁷⁶ *Id.* at 20–21.

⁷⁷ *Id.* at 21.

⁷⁸ *Id.*

⁷⁹ *Id.* at 22.

B. Employee Outbursts: *Atlantic Steel* Protects Use of Harassing Vulgarities

An employee engaged in protected activity under Section 7 of the NLRA “can, by opprobrious conduct, lose the protection of the Act.”⁸⁰ Under the Board’s *Atlantic Steel* test, four factors must be weighed in assessing whether an employee’s speech is protected by the NLRA or is instead subject to disciplinary action by the employer: “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.”⁸¹ “The *Atlantic Steel* standard attempts to balance the employer’s interest in an orderly work environment with the employee’s right to engage in concerted activity.”⁸² However, under this standard, employees may use sarcasm along with obnoxious language, including cursing and calling a supervisor unpleasant names.⁸³

The question of whether this protection of Section 7 activity under the opprobrious standard comes at the expense of protections from harassment under Title VII has represented a longstanding concern.⁸⁴ In 1991, Professor Peter Millspaugh questioned whether Section 7 activity under the NLRA should supersede protections under Title VII with respect to racial harassment in the workplace.⁸⁵ Millspaugh discussed the Board’s 1988 *Arthur Young & Co.* decision where employees engaged in concerted activity also made racial and ethnic slurs regarding blacks and Puerto Ricans.⁸⁶ The administrative law judge found that the alleged racial slurs did not include those “typically offensive ways of describing blacks or Puerto Ricans.”⁸⁷

The administrative law judge in *Arthur Young* also noted that the employer asserted that if it had not discharged the employees involved for their use of racial slurs, the employer would have been subject to potential liability under Title VII.⁸⁸ Nevertheless, the administrative

⁸⁰ See *Atl. Steel Co.*, 245 N.L.R.B. 814, 816 (1979).

⁸¹ *Id.*

⁸² Elizabeth Allen, Note, *You Can’t Say That on Facebook: The NLRA’s Opprobriousness Standard and Social Media*, 45 WASH. U. J.L. & POL’Y 195, 207 (2014); see also Susan D. Carle, *Angry Employees: Revisiting Insubordination in Title VII Cases*, 10 HARV. L. & POL’Y REV. 185, 218–21 (2016) (describing the *Atlantic Steel* doctrine).

⁸³ Allen, *supra* note 82, at 207 (citing Board decisions).

⁸⁴ See Peter E. Millspaugh, *When Self-Organization Includes Racial Harassment: Must the NLRA Yield to Title VII?*, 2 GEO. MASON U. C.R. L.J. 1, 12–13 (1991).

⁸⁵ *Id.* at 14.

⁸⁶ See *Arthur Young & Co.*, 291 N.L.R.B. 39, 44 (1988).

⁸⁷ *Id.* at 44 n.11.

⁸⁸ *Id.* at 44 n.13.

law judge rejected this argument by stating this “assertion goes far beyond what the facts in this case could conceivably justify” because an “occasional ethnic slur” is not actionable as it does not reach the level of “derogatory comments . . . so excessive and opprobrious as to constitute an unlawful practice under Title VII.”⁸⁹

This finding creates a dilemma for employers. Only comments that are so severe and pervasive that they create hostile environment liability will be exempt from NLRB protection if made as part of concerted activity. However, an employer’s choice to do nothing when offensive speech is conveyed could still create hostile environment liability under Title VII. This inaction also sends a chilling and retaliatory message to black employees that any protests to the use of racial slurs, when couched with concerted activity, will be ignored by the employer. But, if the employer takes disciplinary action, that discipline can represent an unfair labor practice in coercing employees in the exercise of their Section 7 rights under the NLRA.

Although the Board’s application of *Atlantic Steel* allows profane comments, the Board has not clearly applied the *Atlantic Steel* factors to protect the use of racial epithets. However, the Board’s application of *Atlantic Steel* does suggest broad acceptance of offensive speech as being protected by the NLRA. In its most recent application of the *Atlantic Steel* test in 2014’s *Plaza Auto Center, Inc.*,⁹⁰ which came to the Board on remand from the United States Court of Appeals for the Ninth Circuit, the Board was required to reapply the four-factor *Atlantic Steel* test to determine whether an employee’s outburst during protected activity caused the loss of protection under the Act.⁹¹

The Board had to determine the nature of the outburst, whether it involved obscene remarks that constituted insubordination, or whether it was also menacing, physically aggressive, or belligerent.⁹² The specific incident involved an employee who lost his temper after discussing working conditions with his supervisor, calling the supervisor a “fucking mother fucking,” a “fucking crook,” and an “asshole” who was stupid as “nobody liked him and, everyone talked about him behind his back.”⁹³ The Board held that the employee did not engage in menacing, physically aggressive, or belligerent conduct and as a result his speech was

⁸⁹ *Id.*

⁹⁰ 360 N.L.R.B. 972, 979 (2014) (holding that the employee retained the protection of the Act despite his outburst as the Act protects his right to engage in Section 7 activity without unduly impairing the employer’s legitimate interest in maintaining order and discipline in the workplace).

⁹¹ *Id.* at 972.

⁹² *Id.* at 974.

⁹³ *Id.*

considered protected Section 7 activity.⁹⁴ In a dissenting opinion, Member Harry Johnson argued: “The holding here that a profane, sustained, ad hominem attack on a senior manager in the work force must be tolerated because of the connection to Section 7 activity unnecessarily impedes employers’ ability to deal with such conduct if engaged in by one worker against another.”⁹⁵

In another decision, *Pier Sixty, LLC*,⁹⁶ an employee, upset with his supervisor about how the supervisor addressed him during an organizing campaign, used his iPhone during a break to post the following comment about his supervisor on Facebook: “Bob is such a NASTY MOTHER FUCKER don’t know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!”⁹⁷ The Board found that this statement was protected Section 7 activity as the opprobriousness of the statement did not outweigh the other factors involved, including the employer’s anti-union hostility, the provocation and impulse of the employee, the subject matter, the limiting of the communication to the employee’s Facebook friends, the nature of the post, the use of similar language by the employer, and the lack of a policy that prohibits such language.⁹⁸

Again, Member Johnson wrote a rather passionate dissent in which he especially criticized the language the employee used attacking his supervisor’s family and the Board’s allowance of such.⁹⁹ Member Johnson first stated that under the totality of the circumstances it was quite appropriate for Pier Sixty to discipline the employee, Perez.¹⁰⁰ He then stated:

In condoning Perez’ offensive online rant, which was fraught with insulting and obscene vulgarities directed toward his manager and his manager’s mother and family, my colleagues recast an outrageous, individualized griping episode as protected activity. I cannot join in concluding that such blatantly uncivil and opprobrious behavior is within the Act’s protection.¹⁰¹

⁹⁴ *Id.*

⁹⁵ *Id.* at 982 (Member Johnson, dissenting) (citing Kerri Lynn Stone, *Floor to Ceiling: How Setbacks and Challenges to the Anti-Bullying Movement Pose Challenges to Employers Who Wish to Ban Bullying*, 22 TEMP. POL. & C.R. L. REV. 355 (2013)).

⁹⁶ 362 N.L.R.B. No. 59, 2015 WL 1457688 (Mar. 31, 2015).

⁹⁷ *Id.* at *2.

⁹⁸ *Id.* at *5.

⁹⁹ *Id.* at *5 (Member Johnson, dissenting).

¹⁰⁰ 362 N.L.R.B. No. 59, 2015 WL 1457688, at *5 (Mar. 31, 2015).

¹⁰¹ *Id.*

Member Johnson argued that Perez's statements were, in fact, "qualitatively different" than statements other employees had used and were tolerated by Pier Sixty.¹⁰² According to Member Johnson, the comments directed at the supervisor's family were "over the top" and were not deserving of the Act's protection.¹⁰³ The comments were "personally offensive" and were broadcast to a much broader audience than employees cursing at one another in the workplace.¹⁰⁴

On the other side of the equation are cases that have started to suggest that employee misconduct involving offensive statements may result in unprotected conduct despite the *Atlantic Steel* factors. For example, in *Fresenius USA Manufacturing, Inc.*,¹⁰⁵ the Board revisited a prior case that had been overturned due to a lack of the proper number of Board members.¹⁰⁶ The prior 2012 decision in *Fresenius*¹⁰⁷ held that the employee's improper and vulgar behavior in using the word "pussy" during the course of otherwise concerted activity was protected.¹⁰⁸ Specifically, the employee anonymously wrote statements on union newsletters left in the employee breakroom in an attempt to support the union during a decertification election including stating "Dear Pussies, Please Read!"¹⁰⁹ The Board found that he did not forfeit the NLRA protection despite a sexual harassment complaint.¹¹⁰ In revisiting the 2012 decision with a properly constituted number of Board members in 2015, the Board, without disavowing the earlier finding that the employee's handwritten remarks were protected, noted the importance of the employer's Title VII interest in investigating the conduct and reached a different result from its prior decision.¹¹¹ Ultimately the Board sustained the employer's discharge of the employee because the employee had lied during the course of the employer's investigation.¹¹²

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ 362 N.L.R.B. No. 130, 2015 WL 3932160 (June 24, 2015).

¹⁰⁶ *Id.* at *2–3.

¹⁰⁷ *Fresenius USA Mfg. Inc.*, 358 N.L.R.B. 1261 (2012) (applying the *Atlantic Steel* factors to assess whether an employee's conduct should be protected after female employees objected to the language pursuant to Title VII; however, the decision involved recess appointment Board members who were eventually found to be unconstitutionally appointed), *vacated and remanded*, No. 12-1387 (D.C. Cir. 2014).

¹⁰⁸ *Id.* at 1266.

¹⁰⁹ *Id.* at 1261, 1265.

¹¹⁰ *Id.* at 1266, 1267–68.

¹¹¹ 362 N.L.R.B. No. 130, 2015 WL 3932160, at *2–3.

¹¹² *Id.*

III. ACCOMMODATING EMPLOYER REGULATION OF RACIST SPEECH THROUGH TITLE VII RETALIATION AND CIVILITY ANALYSIS IN FUTURE NLRB DECISIONS

To the extent the Board continues to address racist statements made by employees in the workplace, it must acknowledge the important policy reasons why employers must be allowed to take disciplinary action when such statements occur. Under the Board's current analysis, an employee can say almost anything without punishment.¹¹³ Employers have obligations under Title VII to respond to racist statements by employees as mechanism to prevent liability for racial harassment.¹¹⁴ However, a "mere utterance of an . . . epithet which engenders offensive feelings . . . ' does not sufficiently affect the conditions of employment to implicate Title VII."¹¹⁵ But an employer may be liable for harassment under Title VII "if it knew or should have known about the conduct and failed to stop it" as it reached the level of being severe and pervasive to establish a hostile environment.¹¹⁶ As a result, employers are faced with the Hobson's choice of being found liable under Title VII for failing to address racist statements in the workplace versus being found liable for unfair labor practices when taking action against an employee for racist statements found to be protected under the NLRA.

Strong policy reasons pursuant to Section 7 of the NLRA and its protection of concerted activity by employees may suggest some support for protecting speech uttered in the workplace even if it is offensive. In an adversarial setting where emotions and passions reach a fever pitch, the Board has found that it is better to err on the side of protecting workers who may impulsively and roughly say bad language to replacement workers or their supervisors.¹¹⁷ Certainly, opportunistic employers, ready to violate the NLRA by terminating employees for exercising Section 7 rights, may rush to judgment regarding the assessment of discipline for impulsive comments made in the heat of the moment and

¹¹³ This inappropriate and narrowing approach of only considering whether the speech is a threat is not limited to just racist speech. See *Wayne Stead Cadillac*, 303 N.L.R.B. 432, 436 (1991) (administrative law judge finding a striking employee's statements were protected when the employee grabbed his testicles and gyrated his hips back and forth while yelling "fuck you" towards a nonemployee and the nonemployee's 8-year-old daughter who were in their car attempting to leave the employer's premises).

¹¹⁴ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (describing how an employer may have a defense to a harassment claim by establishing "that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior").

¹¹⁵ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB, v. Vinson*, 477 U.S. 57, 67 (1986)). Also, "simple teasing" [or] offhand comments" do not establish a claim of harassment under Title VII. See *Faragher*, 524 U.S. at 788.

¹¹⁶ See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 759 (1998).

¹¹⁷ See *Allied Indus. Workers Local 289*, 476 F.2d 868, 879 (D.C. Cir. 1972).

part of the “rough-and-tumble” environment that the Board accepts by its policies aimed at protecting legitimate Section 7 activity.¹¹⁸ The Board, in its expertise, has weighed this balance in favor of allowing offensive speech for employees in the heat of the moment as long as the comments do not rise to the level of being threatening or physical.¹¹⁹

In identifying the policy reasons for allowing such offensive speech when compared with the policy reasons for banning harassment, bullying, and unproductive workplace speech, there are both legal and pragmatic considerations for employers and employees offended by such speech.¹²⁰ However, as Professor Dianne Avery had noted back in 1993, protection of certain offensive language by the NLRB seems to condone as appropriate an anachronistic form of workplace “behavior in the ‘rough and tumble’ of labor activity.”¹²¹ At this stage in the development of workplace law and legitimate employer concerns regarding the prevention of harassment and bullying based upon offensive language being used, the time has come for the NLRB to consider the burdens on employers who must respond when faced with evidence of racist comments being aimed at employees. Furthermore, the Board must shift its focus to the employees subjected to the racist comments and the effect on their ability to exercise their Section 7 rights in light of the language being allowed by the Board as being protected.

While acknowledging that the Board cannot justify its analysis in allowing striking employees the protection to signal to other employees that racist statements are necessary to convey their concerns while on the picket line, Judge Millett’s concurring opinion in *Consolidated Communications* offers two suggestions that should be considered by the Board before it decides to continue its protection of racist speech. First, the opinion notes that the Board’s analysis appears to focus on the perspective of the perpetrator rather than the victim when assessing whether the statements made are a threat or coercive.¹²² Second, the opinion highlights the Board’s failure to consider how the racist statements may have an effect beyond the picket line when a black employee “has seen the darkest thoughts of a co-worker revealed in a deliberately

¹¹⁸ See *Consolidated Communications*, 837 F.3d 1, 12 (D.C. Cir. 2016) (citing *Allied*, 476 F.2d at 879).

¹¹⁹ See *Briar Crest Nursing Home*, 333 N.L.R.B. 935, 947 (2001).

¹²⁰ See Cynthia L. Estlund, *Freedom of Expression in the Workplace and the Problem of Discriminatory Harassment*, 75 TEX. L. REV. 687, 753–59 (1997).

¹²¹ See Dianne Avery, *Gender Stereotypes, Picket Line Violence, and the “Law” of Strike Misconduct Cases*, 8 OHIO ST. J. ON DISP. RESOL. 251, 274 (1993).

¹²² 837 F.3d at 23 (Millett, J., concurring).

humiliating tirade” and may not “feel truly equal or safe working alongside that employee again.”¹²³

Some “[r]esearch studies show that workplace morale, as well as individual employees’ psyche, productivity, and mental health, are all threatened by abusive, discriminatory workplace speech.”¹²⁴ Black employees—more than any other racial or ethnic group—are likely to experience frequent discrimination and report symptoms of depression as a result of that discrimination.¹²⁵ Also, Professor Kerry Stone has explained: “when group members . . . have their complaints ignored, this disregard may be read as corporate ratification of the unlawful behavior.”¹²⁶ As a result, employers have a strong justification to change the analysis that leaves them helpless to respond when employees have uttered racist, sexist, and vulgar statements with impunity based on protection under the NLRA.

At a minimum, and without making a major change, the Board should reverse its *Airo Die Casting* and *Cooper Tire* decisions. Then the Board should also consider the thoughtful concerns of Members Schaumber and Kirsanow expressed in *Airo Die Casting* regarding how the use of the N-word could result in loss of protection under the NLRA even without the presence of a threat or violence.¹²⁷ To that end, the Board should view racist statements by employees similar to the statements in *Airo Die Casting* and *Cooper Tire* as having a tendency to coerce fellow black employees in the exercise of their Section 7 rights. This is not a huge step for the NLRB, which considers inflammatory appeals based upon race during an election campaign to be improper.¹²⁸

Instead of looking like a federal agency that is willing to protect racist speech, the Board should start with the premise that racist speech does not receive protection under the NLRA as concerted activity.¹²⁹ However, when looking at the disciplinary action taken in re-

¹²³ *Id.* at 24.

¹²⁴ Kerri Lynn Stone, *Decoding Civility*, 28 BERKELEY J. GENDER L. & JUST. 185, 213 (2013).

¹²⁵ *Id.*

¹²⁶ *Id.* at 221.

¹²⁷ 347 N.L.R.B. 810, 810 n.1 (2006) (noting “there may well be circumstances . . . in which a picketing employee’s use of the word ‘nigger’ might cause the employee to lose the Act’s protection, even in the absence of violence or explicit threats of violence”).

¹²⁸ See Sewell Manufacturing Co., 138 N.L.R.B. 66, 71–72 (1962) (identifying election campaign appeals to racial prejudice that are not germane are inappropriate and finding that such appeals warrant setting aside any NLRB election results).

¹²⁹ This Article recognizes that the political and partisan nature of the NLRB could help a newly-constituted Republican Board in pursuing the changes suggested herein to overrule *Airo Die Casting* based on the opinions of the Republican NLRB members in that case. See Green, *supra* note 17, at 1644 (describing how the NLRB’s analysis has been criticized as political in that it

sponse to this racist speech, the employer must not act in a discriminatory manner by taking harsher actions for those employees also involved in Section 7 activity. As in *Cooper Tire*, if other employees involved in much more drastic behavior received lesser sanctions, or no sanctions, when compared with the employees involved in uttering the racist speech, then this discriminatory treatment under the NLRA may protect those employees despite their racist comments.

Without having to reach the legal standard of actionable harassment, employers should have the right to regulate employee speech that involves the utterance of racially-charged language. Because utterance of racial epithets in the workplace requires severe and pervasive situations to foster a hostile environment, Title VII may not adequately address basic issues before they reach that level. Nevertheless, basic notions of civility and prevention of bullying and harassment in the workplace as a tool for productivity and sufficiency represent legitimate reasons for an employer's disciplinary actions.¹³⁰ Title VII cases consistently state that antidiscrimination law does not operate as a civility code "designed to rid the workplace of vulgarity."¹³¹ However, basic incivility creates a major financial problem for employers. Christine Porath and Christine Pearson have documented the significant financial costs that employers undertake as a result of incivility:

The costs chip away at the bottom line. Nearly everybody who experiences workplace incivility responds in a negative way, in some cases overtly retaliating. Employees are less creative when they feel disrespected, and many get fed up and leave. About half deliberately decrease their effort or lower the quality of their

changes "from one administration to the next"). Also, the prospect of seeking a legislative resolution to address racist speech through changes to the NLRA is unlikely as repeated attempts to amend that statute in Congress have primarily failed for more than forty years. *Id.* at 1625 n.9 (describing the difficulty in obtaining legislative reform regarding the NLRA) (citing Richard D. Kahlenberg & Moshe Z. Marvit, "Architects of Democracy": *Labor Organizing as a Civil Right*, 9 STAN. J. C.R. & C.L. 213, 221–29, 231–36 (2013)).

¹³⁰ See Stone, *supra* note 124, at 223–26.

¹³¹ See *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 295 (2006). Although outside the scope of this Article, there are some situations where employees may use racist speech, including the N-word, when it is not directed at a particular employee and the context may suggest that the employee who uttered those words was not appreciating the racial implications of the speech. See Eisenstadt, *supra* note 2, at 314 (arguing that "linguistic meaning, particularly of derogatory terms, is a complex phenomenon that results from a multitude of contextual factors . . . [and] include time, place, identity of the parties, and tone of voice"). Professor Leora Eisenstadt has raised this concern and suggested that the racial identity of the speaker as an outsider or insider of the racial group at issue should be considered in some context—possibly through expert testimony to help a jury understand the use of certain speech deemed racist and how an employer should respond to it. *Id.* at 306, 335–42. Eisenstadt also notes that there are weaknesses in her suggestion including potential inconsistency. *Id.* at 348.

work. And incivility damages customer relationships. Our research shows that people are less likely to buy from a company with an employee they perceive as rude, whether the rudeness is directed at them or at other employees. Witnessing just a single unpleasant interaction leads customers to generalize about other employees, the organization, and even the brand. . . . And we've collected data from more than 14,000 people throughout the United States and Canada in order to track the prevalence, types, causes, costs, and cures of incivility at work. We know two things for certain: Incivility is expensive, and few organizations recognize or take action to curtail it.¹³²

As the *Pickering* test under First Amendment jurisprudence clearly establishes, employers should be able to regulate worker speech through disciplinary action aimed at an employer's need to promote the efficiency of its services, which outweighs the employee's speech interests.¹³³ When looking at the overall efficiencies and costs related to incivility in the workplace, an employer has a strong, compelling interest to take disciplinary action based on racist speech that is independent of but in conjunction with any desire to comply with Title VII's anti-harassment laws.

Because the failure to respond to racist statements can deter a reasonable employee from opposing racist practices,¹³⁴ the Board should also take into account Title VII's broad standard regarding retaliation and how acquiescence to harassing statements can create retaliation liability for employers. The Supreme Court broadened the scope of Title VII's anti-retaliation provision by noting that the claim covers a "materially adverse" action which includes any action that might have "dissuaded a reasonable worker from making or supporting a charge of discrimination."¹³⁵

Certainly, black employees will be subjected to materially adverse action when employers, faced with evidence of racist statements towards black employees, must still let those statements go without any

¹³² See Christine Porath & Christine Pearson, *The Price of Incivility*, HARV. BUS. REV. (Jan.-Feb. 2013), <https://hbr.org/2013/01/the-price-of-incivility/ar/1> [<https://perma.cc/B55X-WNUA>].

¹³³ See *Pickering*, 391 U.S. at 568; see also *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion discussing public employer's interest in efficiency as the basis to outweigh an employee's First Amendment interest); *Connick*, 461 U.S. at 154 (describing the same balance of concerns and allowing employer concerns in addressing key services that the government provides the public).

¹³⁴ Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 35 (2005).

¹³⁵ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (citing *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

disciplinary action due to the NLRB's analysis which finds that the racist statements are protected. There are many cases under Title VII where black employees have complained about the use of racist speech and epithets.¹³⁶ One commentator has even asserted that an isolated, single racist statement involving the N-word should create hostile environment liability for an employer.¹³⁷

Other cases suggest that an employer's failure to respond to an isolated, single racist comment may create retaliation liability for an employer under Title VII. In *Boyer-Liberto v. Fontainebleau Corp.*,¹³⁸ the United States Court of Appeals for the Fourth Circuit found that a black employee who had complained about a single, racially derogatory comment was able to establish a retaliation claim.¹³⁹ The court reversed a prior decision holding that an employee could not bring a claim for retaliation by opposing an isolated comment since that comment did not rise to the level of a severe and pervasive act required for actionable harassment under Title VII.¹⁴⁰ The court noted that if it applied this single comment analysis, it would deter reasonable employees from speaking up and deprive them of the right to pursue a retaliation claim.¹⁴¹ Also, in *Rivera v. Rochester Genesee Regional Transportation Authority*,¹⁴² the United States Court of Appeals for the Second Circuit found that a supervisor's reaction to an employee's complaint about co-workers' racial slurs, in telling the employee to suck it up and get over it, was a material adverse action with respect to a retaliation claim. As a result, the court noted that "unchecked retaliatory co-worker harassment" can establish a material adverse action warranting a retaliation claim against an employer.¹⁴³

¹³⁶ See, e.g., *Fisher v. Lufkin Indus. Inc.*, 847 F.3d 752 (5th Cir. 2017); *Douglas v. J.C. Penney*, 474 F.3d 10 (1st Cir. 2007); *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572 (D.C. Cir. 2013).

¹³⁷ See Darryll M. Halcomb Lewis, *The Creation of a Hostile Work Environment by a Workplace Supervisor's Single Use of the Epithet "Nigger"*, 53 AM. BUS. L. J. 383, 384 (2016) (arguing that the single use of the epithet is such an "extremely serious incident" that it should be sufficient to establish a hostile environment claim).

¹³⁸ 786 F.3d 264, 281 (4th Cir. 2015).

¹³⁹ *Id.* at 284.

¹⁴⁰ *Id.* at 274–75.

¹⁴¹ *Id.* at 283; see also Tristin K. Green, *Racial Emotion in the Workplace*, 86 S. CAL. L. REV. 959, 1019 (2013) (discussing how retaliation analysis must allow employees to oppose practices that may not rise to the clear level of actionable harassment as a tool to encourage prophylactic measures).

¹⁴² 743 F.3d 11, 26 (2d Cir. 2014).

¹⁴³ *Id.*

IV. CONCLUSION: THE NLRB SHOULD NOT TOLERATE RACIST WORKPLACE SPEECH

Now let's return to the discussion among the two employees at the beginning of this Article. The second employee's statement was:

[N]othing will be gained from mentioning Black Lives Matter in this union organizing campaign. Black Lives Matter just represents a crusade to address what happened to a bunch of N-word criminals who deserved what they got. All lives matter. . . . [S]top being distracted by issues of race and focus on the only division that matters in the workplace: class.

The rationale of allowing rough-and-tumble activity in the heat of the moment as supporting concerted activity under Section 7 of the NLRA when on the picket line or as a result of an angry outburst towards a supervisor does not appear to fit well with this comment. The second employee's decision to use the N-word does not seem to have any real relationship to the concerted activity of discussing the selection of a union. But even if the use of the N-word is considered to be part and parcel of the overall comments about selecting a union as concerted activity, the employer has a strong interest in regulating this speech as a result of the potential problems created for black employees by failing to regulate racist comments in the workplace.

Although an employer must send a message to stop racist utterances before they reach the level of being severe and pervasive to create a racially hostile environment in violation of Title VII, the need for this regulation is not based upon actual compliance with Title VII, per se, as usually a single utterance is insufficient to establish liability. Nevertheless, NLRB actions should not easily supersede an employer's efforts to prevent a hostile environment from arising and subjecting that employer to Title VII liability. Further, the regulation of these comments is also necessary because of the tremendous costs to the employer's efficient operation by having incivility and bullying permeate the workplace through the use of racial epithets and other racist statements. Employees, who are pursuing their Section 7 rights, should not receive protection from the NLRA when using racist speech to effectuate those rights. Nor should the NLRB enforce the NLRA in a manner that seems to condone the use of racist speech. Under the analysis established in this Article, employees with legitimate Section 7 concerns can still seek protection for their racist statements when the facts indicate that the employer has chosen to take disciplinary action based on the racist

statements merely as a pretext to disciplining employees because of their concerted activity.¹⁴⁴

The toxic incivility created by allowing employees who utter such racist statements to be defended as a matter of right under the NLRA also becomes the impetus for the employer's disciplinary and regulatory action related to that speech. Title VII's broad protection for retaliatory employer actions that would deter a reasonable person from pursuing a claim suggests that the NLRB's application of doctrines that result in an employer's inability to respond to racist speech should not be allowed absent proof of pretext. Otherwise, a message will be sent to black employees that it is useless for them to protest racist speech in the workplace out of fear that the NLRB will find the speech protected. By removing these doctrines that seem to condone racist workplace speech, employee productivity and efficiency in the workplace will increase as employees can focus on their jobs without being weighed down by uncivil colleagues who bully and harass through racist statements.

We no longer operate in the rough-and-tumble times when the NLRB had the audacity to adopt certain doctrines (under its responsibilities to enforce the NLRA) that protect racist speech and the utterance of racial epithets either made on the picket line, in an outburst to a supervisor, or in any other manner. With the growing diversity of the workplace and the legal and moral responsibility that employers have to protect black employees from racial harassment, those rough-and-tumble doctrines should no longer be a viable part of the Board's analysis. The current heightened environment regarding protests of racist treatment in our society exhibited by the Black Lives Matter movement can only be exacerbated by having a federal agency, charged with protecting workers' rights, engaged in condoning the use of racist statements in the workplace.

Employees who are involved in Section 7 activity under the NLRA should be sent the message that regardless of the context, racist utterances will not be tolerated. The only saving grace for such racist statements under the NLRA is when the employer takes disciplinary action allegedly because of the statements as merely a pretext to its real motivation of chilling Section 7 activity. A racist statement or utterance of a racial epithet should not have to rise to the level of being a threat or involve a physical act for it to be considered unprotected under the NLRA for coercing black workers in the exercise of their Section 7

¹⁴⁴ See *Domsey Trading Corp.*, 310 N.L.R.B. 777, 778 (1993) (finding that employers may not tolerate behavior by non-strikers or replacements but seek to discipline strikers for such behavior); *Ozburn-Hessey Logistics, LLC.*, 359 N.L.R.B. 1025 (2013) (finding discriminatory application of discipline based on use of racial epithets).

rights. Employers, unions, employees, and those who care about issues of racism in the workplace in this Black Lives Matter climate will all benefit from having the NLRB change its analysis to recognize that racist statements and utterances of racial epithets should not receive broad protection under the NLRA.